BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHARLIE J. MCENDREE	)	
Claimant	)	
	)	
VS.	)	
	)	
B & W CUSTOM TRUCK BEDS, INC.	)	
Respondent	)	Docket No. 1,010,670
	)	
AND	)	
	)	
PATRONS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the November 12, 2004 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on May 10, 2005.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Scott J. Mann of Hutchinson, Kansas, appeared for respondent and its insurance carrier. Rex W. Henoch of Lenexa, Kansas, also appeared for the respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant's termination for not meeting production standards was not willful. Accordingly, his termination did not prevent him from a work disability. But the ALJ determined claimant did not make a good faith effort to find

employment and therefore a wage was imputed. The ALJ awarded claimant a 47.63 work disability based upon a 45 percent task loss and a 50.25 percent wage loss.

The respondent requests review of the nature and extent of claimant's disability. Respondent argues claimant was terminated for good cause and his lack of good faith in retaining appropriate employment limits his recovery to his functional impairment. Respondent further argues claimant refused, without just cause, to return to his regular job duties with respondent and such action did not demonstrate a good faith effort to retain appropriate employment at a comparable wage to his pre-injury average gross weekly wage.

In the alternative, respondent argues the ALJ's determination claimant failed to make a good faith job search should be affirmed but that the wage imputed should be at least the same as claimant's pre-injury average gross weekly wage. Consequently, respondent concludes claimant's recovery should be limited to his functional impairment rating.

Conversely, claimant requests the Board to affirm the ALJ's determination that claimant is entitled to a work disability but to increase the work disability to 72.5 percent.

The sole issue for Board determination is the nature and extent of claimant's disability. Specifically, whether claimant is entitled to a work disability (permanent partial general disability greater than the whole person functional impairment rating) or should he be limited to his functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings are accurate and supported by the evidence contained in the record. It is not necessary to repeat those findings in this Order. The Board adopts those findings as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein.

The respondent argues claimant was terminated from his employment because he refused to return from a light-duty job to his regular job duties. Accordingly, respondent argues claimant failed to make a good faith effort to retain appropriate employment paying a comparable wage.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.[1] If claimant was terminated for misconduct or insubordination such actions are tantamount to a refusal to perform appropriate work as in *Foulk*[2] or a failure to make a good faith effort to retain appropriate employment as described in *Copeland*[3]. In such an instance the wage he was earning and would have continued to earn had he continued working for respondent would be imputed to him. As this was at least 90 percent of his average weekly wage, his permanent partial general disability award would be based upon his permanent functional impairment.[4]

Respondent had provided claimant an accommodated job while he was receiving medical treatment. In April 2003 the authorized treating chiropractor notified respondent that claimant was released to return to full duties without restriction but continued treatment. On May 5, 2003, the respondent's safety director and claimant's supervisor met with claimant and told him that he should return to his former job where he had been injured and that his return would be on a gradual rotation basis. Claimant responded that he did not think he could perform the heavy lifting that his former job required and refused to return to that job. The claimant was told that he could return to the light-duty work until the matter could be discussed with the personnel and plant manager.

On May 12, 2003, claimant was summoned to a meeting with the respondent's president, production manager, human resources manager and the claimant's supervisor. The claimant's employment was terminated. The human resources manager, Michael Taylor, testified that claimant was fired because of poor production. Claimant's supervisor, Scott Barnhart, confirmed claimant was fired because of lack of production. A letter memorializing the meeting indicated claimant was terminated because of lack of production.[5]

Although respondent now infers claimant was terminated for cause because he refused to return to his former job, the evidence clearly indicates the claimant was told he was being terminated because of his lack of production while operating the various machines that he ran for respondent.

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[1] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[4] K.S.A. 44-510e.

[5] Taylor Depo., Ex. 1.

In this case, claimant was terminated for poor production. As noted by the ALJ:

> **The only specific thing the claimant did in contravention of the respondent's wishes was to refuse the rotation scheme, and he was not terminated for that reason.** Simply being not good enough or fast enough at one's job is not tantamount to a lack of good faith, which implies an element of intention or recklessness by the employee. Nothing in the record indicated that the claimant was intentionally a poor worker, or knowingly created circumstances that could get him fired.[6] (Emphasis added.)

Because claimant's termination was based upon his poor job performance, the Board concludes that neither party acted in bad faith and that a work disability award is not precluded. Claimant's inability to meet production standards does not demonstrate such an element of willfulness to conclude claimant's conduct was tantamount to a refusal to perform work. Accordingly, the claimant's termination from employment with respondent does not prevent him from seeking a work disability in this case.

If it is determined that a worker has made a good faith effort to find appropriate employment, the difference in pre- and post-injury wages based on the actual wages can be made. If it is determined that a good faith effort has not been made, then an appropriate post-injury wage will be imputed based on all the evidence, including expert testimony concerning the capacity to earn wages.[7]

The ALJ concluded the claimant did not make a good faith effort to find appropriate employment after his employment with respondent was terminated. The Board agrees and adopts the ALJ's factual findings regarding claimant's lack of an appropriate job search. Consequently, an appropriate post-injury wage must be imputed based on all the evidence.

In the determination of the appropriate wage to impute the Board notes, as did the ALJ, the claimant has a commercial drivers license but only applied for one driving job. The claimant agreed that no doctor restricted him from driving.[8] The claimant was questioned why he had not applied for any over-the-road truck driving positions and indicated it was a personal decision because he didn't like to be in a truck for long periods of time. And he agreed that such a truck driving job would pay as much, if not more, than his wage earned working for respondent. Claimant testified:

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[6] ALJ Award (Nov. 12, 2004) at 4.

[7] *Copeland v. Johnson Group, Inc.*, 26 Kan. App. 2d 803, 995 P.2d 369 (1999), *rev. denied* 269 Kan. 931 (2000).

[8] R.H. Trans. at 50.

> Q. (By Mr. Mann) Sir, if you were to obtain an over-the-road trucking job, which you are qualified to perform with a CDL and have performed in the past, as I understand it, you would be able to return to earning a wage which would be equal to, if not greater than, the wage you were earning with B&W Custom Truck Beds, correct?
>
> A. Correct.[9]

Although claimant stated that driving a truck would bother his left leg while clutching the vehicles he further admitted that an over-the-road truck driver rarely uses the clutch very much.

The Board concludes the claimant has the ability to earn a wage as a truck driver equal to or greater than his pre-injury average gross weekly wage. Consequently, his permanent partial general disability award is based upon his permanent functional impairment. Moreover, Dr. Stein did not place any restrictions on claimant and both vocational experts testified that absent restrictions, the claimant would not have a wage loss. Mr. Longacre further testified that there were jobs available in the vicinity where claimant lives that would pay a wage comparable to what claimant was earning with respondent.

The ALJ concluded claimant's functional impairment was 5 percent to the body as a whole, which both Drs. Prostic and Stein testified would be the claimant's impairment according to the DRE Lumbosacral category of the AMA *Guides*[10]. The Board agrees and affirms.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 12, 2004, is modified to reflect claimant has a 5 percent functional whole person impairment and affirmed in all other respects.

The claimant is entitled to 20.75 weeks of permanent partial disability compensation at the rate of $357.84 per week or $7,425.18 for a 5 percent functional disability, making a total award of $7,425.18 which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

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[9] McEndree Depo. at 49.

[10] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Dated this _____ day of June 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Scott J. Mann, Attorney for Respondent and its Insurance Carrier
Rex W. Henoch, Attorney for Respondent
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director